

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**PEGGY L. NIEMEYER**  
Claimant

VS.

**RUSSELL STOVER CANDIES**  
Respondent

AND

**SENTRY INSURANCE**  
Insurance Carrier

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Docket No. 270,238

**ORDER**

Respondent and its insurance carrier appealed the December 29, 2003 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on June 8, 2004.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Brenden W. Webb of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, the parties agree the medical records that respondent and its insurance carrier's attorney forwarded to the Judge by letter dated October 28, 2003, are part of the evidentiary record as exhibit number six to Dr. Steven L. Hendler's deposition.

**ISSUES**

This is a claim for a September 6, 2001 accident when claimant tripped and fell at work. In the December 29, 2003 Award, Judge Frobish determined claimant injured both her left lower extremity and low back as a result of the September 6, 2001 accident. Averaging a 50 percent task loss with a 100 percent wage loss, the Judge awarded claimant a 75 percent work disability (a permanent partial general disability greater than the whole body functional impairment rating).

Respondent contends Judge Frobish erred. The employer first argues claimant did not injure her back as a result of the September 2001 incident. Next, it argues claimant failed to prove she sustained any permanent functional impairment to her back as a result of the accident at work. And finally, respondent argues a post-injury wage should be imputed for determining any work disability.

Respondent requests this Board to reduce claimant's award to one for a nine percent functional impairment to the left lower extremity. In the alternative, the employer requests the Board to impute a \$310 post-injury average weekly wage, which would decrease claimant's wage loss to 11 percent.

Conversely, claimant contends the Award should be affirmed.

The primary issue before the Board on this appeal is the nature and extent of claimant's injury and disability, which entails the following preliminary issues:

1. Did claimant permanently injure her low back as a result of the September 6, 2001 accident?
2. If so, did claimant prove she made a good faith effort to find appropriate work after being terminated and leaving respondent's employment in December 2002? And if not, what is claimant's post-accident wage earning ability?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant fell after tripping over a cord on September 6, 2001, while working for respondent. Claimant, who worked as a candy packer, described her accident at respondent's candy factory, as follows:

I was putting the boxes of candy into shippers, getting ready to palletize them when the sticker machine broke down. The machine operator asked me to come over and get the boxes of candy from her. I did, so on the third trip back there was a cord on the floor, coiled on the floor. On the third trip back my left foot got tangled up in the cord and I went down on my left knee, hurting my back and my left knee.<sup>1</sup>

The parties stipulated claimant's accident arose out of and in the course of her employment with respondent.

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<sup>1</sup> R.H. Trans. at 11-12.

Claimant immediately left work after the accident and consulted the company physician, Dr. Glen Singer. The doctor x-rayed claimant's left knee and diagnosed a deep bruise.

The following week, Dr. Singer referred claimant to an orthopedic surgeon, Dr. James F. Queenan. Claimant saw Dr. Queenan and on September 18, 2001, underwent an MRI of her left knee that indicated she had a torn lateral meniscus, joint effusions, and chondromalacia. On September 25, 2001, Dr. Queenan operated on claimant's left knee.

Approximately three weeks after the accident, on September 28, 2001, the Division of Workers Compensation received claimant's application for hearing in which she alleged she had injured her low back, left knee, left leg, and left foot in the September 6, 2001 accident at work. The application indicates claimant signed the document on September 16, 2001.

According to Dr. Queenan's medical notes, which the parties entered into evidence by agreement, claimant returned to work on approximately November 19, 2001, performing light duty activities. Those notes also indicate claimant then worked until January 25, 2002, when she was laid off. Moreover, the medical notes reflect on February 14, 2002, claimant reported to Dr. Queenan that standing 30 to 60 minutes caused low back pain. At that visit, the doctor recommended a second opinion for claimant's continuing left knee pain.

Claimant saw Dr. Queenan again on April 11, 2002, at which time the doctor recommended another MRI of the left knee to determine whether she had a new meniscal tear or a loose body in the knee joint.

On April 18, 2002, claimant saw Dr. Gerald F. Dugan for a second opinion. The doctor diagnosed residual left knee pain, status post arthroscopic debridement and microfracture chondroplasty, along with advanced degenerative joint disease in the right knee. The doctor recommended an aggressive physical therapy program, possible injections and perhaps a pain management consult.

According to the medical records, claimant underwent a right knee MRI on April 24, 2002, which indicated partial meniscal tears, a sprain of the medial retinaculum and small joint effusion.<sup>2</sup>

At her attorney's request, on April 26, 2002, claimant saw board-certified orthopedic surgeon Dr. Edward J. Prostic. According to Dr. Prostic, claimant's chief complaint at that

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<sup>2</sup> As Dr. Queenan recommended another MRI of the left knee, the record is not clear whether claimant was mistakenly given a right knee MRI, whether the records contain a typographical error or whether the medical providers actually desired a right knee MRI.

time was low back pain. Dr. Prostin determined claimant was experiencing symptoms that were consistent with lumbar radiculopathy and, accordingly, the doctor rated her as having a 10 percent whole body functional impairment due to the lumbar symptoms and a 15 percent functional impairment to her left leg, which combined for a 14 percent whole body functional impairment. At that time, Dr. Prostin recommended anti-depressant medications and evaluation by a psychotherapist.

In May 2002, Dr. Dugan became claimant's authorized treating physician. On August 7, 2002, Dr. Dugan performed a second arthroscopy on claimant's left knee in which he debrided the patella and medial femoral condyle and also performed a partial lateral meniscectomy.<sup>3</sup>

When claimant saw Dr. Dugan at a November 26, 2002 follow-up visit, the doctor released her to regular work activities. The doctor noted, however, at that time that claimant had been working for respondent but had been recently laid off. The doctor last saw claimant on December 23, 2002, and released her from treatment with permanent work restrictions of, whenever possible, limited standing and walking. The medical notes from that last visit are somewhat contradictory as they indicate claimant has had no back pain, groin pain or other radicular symptoms but nonetheless reflect claimant complained of pain from her groin to her ankle after standing for two hours.

On January 20, 2003, claimant saw Dr. Prostin for a second time. As a result of that evaluation, the doctor concluded claimant would probably benefit from additional medical treatment such as anti-inflammatory medications, intermittent injections, physical therapy, anti-depressant medications and psychotherapy. In Dr. Prostin's opinion, the September 2001 accident either sprained or strained claimant's back, which resulted in trochanteric bursitis and non-neurological radicular symptoms, and also tore the lateral meniscus and either aggravated or precipitated chondromalacia in the patellofemoral joint and the medial compartment of the left knee. Following the second evaluation, Dr. Prostin increased claimant's functional impairment rating to 25 percent for the left leg, which increased claimant's whole body functional impairment rating to 19 percent.

Dr. Prostin believes claimant should be restricted from standing or walking more than 30 minutes per hour; climbing, squatting or kneeling more than minimally; and lifting more than 25 pounds occasionally. After reviewing a list of former work tasks prepared by vocational expert Dan Zumalt, the doctor testified that claimant had lost the ability to perform 10 of the 20 tasks, or 50 percent, considering the tasks individually. However, should the tasks be considered cumulatively, the doctor testified claimant had lost the ability to perform 12 of the 20 tasks, or 60 percent.

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<sup>3</sup> The surgical records refer to surgery on the left knee, but the notes from some of the follow-up visits indicate the right knee.

On July 9, 2003, Dr. Steven L. Hendler examined and evaluated claimant for the respondent and its insurance carrier. Dr. Hendler, who specializes in physical medicine and rehabilitation, rated claimant's left knee using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.) and determined claimant sustained a nine percent functional impairment to the lower extremity. According to Dr. Hendler, due to her knee injuries claimant is unable to perform activities requiring frequent bending or squatting and she is also limited to only occasional standing and walking.

Dr. Hendler also examined claimant's back. The doctor, however, determined claimant sustained no permanent functional impairment to her back according to the *Guides* as she fell within the *Guides'* DRE Lumbosacral Category I, which rates the impairment at zero percent. Moreover, the doctor would not place any work restrictions on claimant due to her back complaints, which he attributes to her altered gait and symptom magnification. After reviewing a list of former tasks prepared by vocational expert Monty Longacre, Dr. Hendler testified claimant could no longer perform two of the 30 tasks, or approximately seven percent.

Claimant last worked for respondent on December 22, 2002. According to claimant, respondent told her the company did not have a job for her within Dr. Dugan's permanent work restrictions. When claimant testified at her July 2003 regular hearing, she remained unemployed, despite contacting an average of approximately four potential employers per week. At the regular hearing, claimant introduced a list of approximately 119 potential employers she had contacted since being terminated by respondent.

The Board is not persuaded claimant has sustained permanent injury to her back as a result of her September 6, 2001 accident or the resulting left knee injury. Although claimant promptly filed a document with the Division of Workers Compensation alleging a back injury, the doctors claimant saw for the September 2001 accident record very few back complaints. Claimant did not receive treatment for her alleged back complaints and she never applied for such medical treatment through the administrative process. Furthermore, both Dr. Prostic and Dr. Hendler concluded that claimant was magnifying her symptoms.

Considering the entire record, claimant has failed to prove she sustained permanent injury to her back. Consequently, claimant's disability benefits are limited to those for a scheduled injury to the left leg. Averaging the 25 percent and nine percent functional impairment ratings to the left leg as provided by Dr. Prostic and Dr. Hendler, respectively, the Board concludes claimant has sustained a 17 percent functional impairment to the left leg as a result of her September 6, 2001 accident. Therefore, the December 29, 2003 Award should be modified to grant claimant disability benefits for a 17 percent functional impairment to the left leg as provided by K.S.A. 44-510d.

**AWARD**

**WHEREFORE**, the Board modifies the December 29, 2003 Award and reduces claimant's award from a 75 percent work disability to a scheduled injury representing a 17 percent functional impairment to the left leg.

Peggy L. Niemeyer is granted compensation from Russell Stover Candies and its insurance carrier for a September 6, 2001 accident and resulting disability. Based upon an average weekly wage of \$350, Ms. Niemeyer is entitled to receive 30.29 weeks of temporary total disability benefits at \$233.35 per week, or \$7,068.17, plus 28.85 weeks of permanent partial disability benefits at \$233.35 per week, or \$6,732.15, for a 17 percent permanent partial disability, making a total award of \$13,800.32, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director